Washington University Law Review

Volume 27 | Issue 1

January 1941

Workmen's Compensation—Course of Employment—Street Accidents

profit from his wrongful act. It is suggested that that policy is not best served by reference to mechanical definitions established primarily for purposes of criminal law. R. W. K.

WORKMEN'S COMPENSATION — COURSE OF EMPLOYMENT — STREET ACCIDENTS—[Missouri].—Claimant's duties required him to spend part of his time on the street. As he was crossing the street, an automobile passed, and a foreign substance was blown into his eye, injuring it. The award of the Workmen's Compensation Commission was in favor of the employee, for an "accident arising out of and in the course of his employment."[1] *Held:* Reversed[2] and remanded with instructions that if claimant could prove it was the automobile which stirred up the dust, he should recover, but if the dust was merely stirred up by the wind, recovery should be denied, since in the latter case the hazard was one unconnected with his employment because one common to the public generally. *Morrow v. Orscheln Bros. Truck Lines.*[3]

Recovery by an injured employee under the Workmen's Compensation Act in situations of this kind depends upon whether the accident arose "out of" the employment within the meaning of the legislation. The Missouri rules with respect to whether various types of street accidents may be said to arise "out of" the injured employee's work are in the formative stage. There are few decisions involving this question, and until the instant one, street accident cases have, in the main, been confined to situations in which the employee was injured in or by a moving vehicle.[4] The reason given

1. R. S. Mo. (1939) §3691.

2. The circuit court had reversed the award of the commission on the sole ground that the claim for compensation was not filed within the time allowed by law. The court of appeals found for claimant on this point.

3. (Mo. App. 1941) 151 S. W. (2d) 138.

4. Howes v. Stark Bros. Nurseries Co. (1930) 223 Mo. App. 793, 22 S. W. (2d) 839 (employee on way to bus furnished by employer, struck by automobile); Wahlig v. Krenning-Schlapp Grocer Co. (1930) 325 Mo. 677, 29 S. W. (2d) 128 (salesman killed when car was struck by train); Sawtell v. Stern Bros. & Co. (1931) 226 Mo. App. 485, 44 S. W. (2d) 264 (bond salesman in making temporary visit didn't materially deviate from course of employment, so that injury when struck by automobile arose out of and in course of employment); Barlow v. Shawnee Inv. Co. (1932) 229 Mo. App. 51, 48 S. W. (2d) 35 (collector for credit company killed as result of accident when his car hit tree); Wyatt v. Kansas City Art Institute (1935) 229 Mo. App. 1166, 88 S. W. (2d) 210 (employee killed by automobile when crossing street); Schroeder v. Western Union Tel. Co. (Mo. App. 1939) 129 S. W. (2d) 917 (messenger boy on bicycle injured by automobile); McCoy v. Simpson (Mo. 1940) 139 S. W. (2d) 950 (salesman killed when his car hit rear of another automobile). A number of cases involving salesmen in automobile accidents have been decided on other grounds, and the fact that the accident arose out of the employment seems to have been assumed. See, e. g., Schulte v. Grand Union Tea & Coffee Co. (Mo. App. 1931) 43 S. W. (2d) 832; Duggan v. Toombs-Fay Sash & Door Co. (Mo. App. 1933) 66 S. W. (2d) 973 (salesman had deviated from employment, otherwise compensation would have been granted); Shroyer v. Missouri Livestock Comm. Co. (1933) 332 Mo. 1219, 61 S. W. (2d) 713.

for the holding of the court in the instant case, that the hazard causing the accident must not be one common to the public generally, would on its face seem to be contrary to language employed in leading Missouri Supreme Court cases dealing with street accidents arising under the Workmen's Compensation Act.[5] These have cited with approval the rule of the leading English case, *Dennis v. White & Co.*,[6] to the effect that if an employee has to pass along the public street and sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment; and have also quoted with approval the statement that "the mere fact that the hazard is one to which every person on the street is exposed is not sufficient to defeat compensation."[7] The instant court's holding, taken in conjunction with the reason for that holding, is ambiguous, however, since whether dust is stirred up by the wind or by a passing automobile, it is a hazard common to the general public. What the court probably meant was that if the streets are the employee's place of work, the hazard must be one peculiar to the public street, in contrast to a risk which might occur any place.[8] Even so, the court's distinction seems invalid, since from a practical standpoint, the hazard from dust blown by the wind is probably greater on the street than in most other places common to the public generally; hence dust blown by the wind could be said to be a hazard peculiar to the street to as great an extent as dust stirred up by an automobile. The opinion indicates that moving vehicles on the

5. Wahlig v. Krenning-Schlapp Grocer Co. (1930) 325 Mo. 677, 29 S. W. (2d) 128 (salesman killed when car was struck by train); Beem v. H. D. Lee Merc. Co. (1935) 337 Mo. 114, 85 S. W. (2d) 441, 100 A. L. R. 1044 (salesman found dead in car, having been shot by unidentified robber).

6. (1917) A. C. 479, Ann. Cas. 1917E, 325 (plumber's mate on bicycle injured when run down by automobile. The House of Lords said, *inter alia*, that it was immaterial that the risk was one which was shared by all members of the public, and that the frequency or infrequency of occasions on which the risk was incurred had nothing to do with the question whether the accident resulting from the risk arose out of the employment.)

7. Wahlig v. Krenning-Schlapp Grocer Co. (1930) 325 Mo. 677, 684, 29 S. W. (2d) 128, 131. The quotation was from Capital Paper Co. v. Connor (1924) 81 Ind. App. 545, 547, 144 N. E. 474, 475 (salesman struck and injured by a street car). In Beem v. H. D. Lee Merc. Co. (1935) 337 Mo. 114, 125, 85 S. W. (2d) 441, 446, 100 A. L. R. 1044, the court quoted from Katz v. A. Kadans & Co. (1922) 232 N. Y. 420, 423, 134 N. E. 330, 331 (dairy truck driver on street stabbed by insane man) as follows: "The question is whether the employment exposed the workman to the risks by sending him on the street, common though such risks were to all on the street." See also the discussion of Dennis v. White & Co. (1917) A. C. 479, Ann. Cas. 1917E, 325, note 6, supra.

8. The court was relying on Great American Indemnity Co. v. Industrial Comm. (1937) 367 Ill. 241, 11 N. E. (2d) 9 (foreign substance blew in eye while adjuster was walking along street); Bloomquist v. Johnson Grocery (1933) 189 Minn. 285, 249 N. W. 44 (bug flew in eye of employee in grocery store). In both cases it was said that there was no evidence that the presence of the foreign substance or bug was due to any condition connected with the place of work. In the *American Indemnity Co.* case it was said: "The entry of a foreign substance in the eye of a pedestrian on the street ordinarily would be similar to the same risk on private property and would have no relation to the employment." id. at 248, 11 N. E. (2d) 9, 12.

street are a hazard connected with and peculiar to the street and seems to assume that conversely a hazard unconnected with a human agency would not be compensable, a proposition which does not logically follow. In making its distinction, the court in all probability was influenced chiefly by the line of cases dealing with accidents caused by acts of God or by the elements. These cases generally hold that some agency of man must increase the hazard;[9] and if the act of God alone is the cause of the injury, no compensation is allowed.[10]

In any event, the language of the court conceals the real problem in the case. The Workmen's Compensation Act provides for liability of the employer without his fault,[11] but only when the accident "arises out of and in the course of" the employment. The term, "out of the employment," must be given meaning, whether or not we question the wisdom of its inclusion in the statute. If an employee is injured by a piece of flying metal which has become detached from a machine while he is working in the employer's factory, there is no doubt that the accident is compensable. The general public is not subject to such risks, and the act clearly was intended to cover this type of accident. When the employee, however, is in the course of his master's business on the street and is injured by a speck of dust, the situation is quite different, since the hazard is not peculiar to the employment: the risk of blowing dust is shared by all persons. The relevant question, then, is should the latter type of situation be held to come within the statute. It would seem that on general principles the test should be whether the hazard of injury from the cause in question was increased by the employment. Clearly the hazard is increased where the employee is upon the streets continually. This refinement of the problem, however, shows the underlying difficulties in situations of this kind, since where the employee is upon the street only spasmodically, whether or not the hazard is increased is extremely difficult to determine.[12] In other jurisdictions where the prob-

9. The same rule is applied to accidents caused by the elements. In the following cases recovery was allowed on the ground that the hazard was increased: (freezing) Morris v. Dexter Mfg. Co. (1931) 225 Mo. App. 449, 40 S. W. (2d) 750; (lightning) Van Kirk v. Hume-Sinclair Coal Mining Co. (1932) 226 Mo. App. 1137, 49 S. W. (2d) 631; Buhrkuhl v. F. T. O'Dell Const. Co. (1936) 232 Mo. App. 967, 95 S. W. (2d) 843, cert. quashed, State ex rel. F. T. O'Dell Const. Co. v. Hostetter (1937) 340 Mo. 1155, 104 S. W. (2d) 671; (heat exhaustion) Kripplaben v. Jos. Greenspon's Sons Iron & Steel Co. (1932) 227 Mo. App. 161, 50 S. W. (2d) 752; Bicanic v. Kroger Grocery & Baking Co. (Mo. App. 1935) 83 S. W. (2d) 917; Wessel v. St. Louis Car Co. (Mo. App. 1940) 136 S. W. (2d) 388.

10. The following cases denied recovery on the ground that the hazard was not increased: (freezing) Taylor v. City Ice & Fuel Co. (Mo. App. 1933) 56 S. W. (2d) 812; (lightning) Felden v. Horton & Coleman (Mo. App. 1939) 135 S. W. (2d) 1115; (heat prostration) Moran v. Edward Peterson Const. Co. (Mo. App. 1933) 56 S. W. (2d) 809; Muesenfechter v. St. Louis Car Co. (Mo. App. 1940) 139 S. W. (2d) 1102; (tornado) Stone v. Blackmer & Post Pipe Co. (1930) 224 Mo. App. 319, 27 S. W. (2d) 459. See also Brooks v. Greenberg (Mo. App. 1934) 67 S. W. (2d) 823.

11. De May v. Liberty Foundry Co. (1931) 327 Mo. 495, 37 S. W. (2d) 640.

12. It might even be argued that if the employee is kept off the streets except for a few short intervals, the hazard is actually decreased.

lem has been considered, the present tendency seems to be towards the liberal view, allowing recovery whether the injured employee is upon the streets all the time or only at intervals.[13]

There are, of course, numerous cases in which it is perfectly clear that the accident arose out of the employment, and others in which it is equally clear that it did not. Between these two extremes are the hard cases such as the present one.[14] A decision either way could be justified, but we may question whether in making technical distinctions such as that in the

13. See Note (1927) 51 A. L. R. 509, which indicates that the earlier view in street accident cases denied compensation, with the exception that where the workman's duties required him to be on the streets continually, recovery was allowed. The later view allows compensation, and in a majority of jurisdictions recovery is allowed whether the workman is on the streets occasionally or continually. See also Dennis v. White & Co. (1917) A. C. 479, Ann. Cas. 1917E, 325, where it was said that the frequency or infrequency of occasions on which the risk occurred had nothing to do with whether the accident arose out of the employment.

14. The Missouri courts have at times gone rather far in allowing recovery in other types of borderline cases. See, e. g., the following cases where compensation was allowed: Assault: Keithley v. Stone & Webster Engineering Corp. (1932) 226 Mo. App. 1122, 49 S. W. (2d) 296 (claimant called a slacker); Thoms v. Kaysing Iron Works (Mo. App. 1932) 54 S. W. (2d) 763 (union difficulty); Buckner v. Quick Seal, Inc. (1938) 233 Mo. App. 273, 118 S. W. (2d) 100 (employee traveling on train assaulted by drunken wrestler). Shooting: Sweeny v. Sweeny Tire Stores Co. (1932) 227 Mo. App. 93, 49 S. W. (2d) 205 (salesman killed by man robbing store); Garnant v. Shell Petroleum Corp. (1933) 228 Mo. App. 256, 65 S. W. (2d) 1052 (filling station attendant shot by bandit); Reed v. Sensenbaugh (1935) 229 Mo. App. 883, 86 S. W. (2d) 388 (garage mechanic shot by man brought into garage by police for questioning); O'Dell v. Lost Trail, Inc. (1936) 339 Mo. 1108, 100 S. W. (2d) 289 (employee sent to look over land for turkeys shot by squatter); Macalik v. Planters Realty Co. (Mo. App. 1940) 144 S. W. (2d) 158 (foreman shot by man whose son he had fired). Horseplay: Gilmore v. Ring Const. Co. (1933) 227 Mo. App. 1217, 61 S. W. (2d) 764 (employees discussing union rule, one shoved plaintiff, causing him to fall). Accidents on employee's own time: Metting v. Lehr Const. Co. (1930) 225 Mo. App. 1152, 32 S. W. (2d) 121 (laborer leaving work slid down rope); Conklin v. Kansas City Public Service Co. (1931) 226 Mo. App. 309, 41 S. W. (2d) 608 (employee injured by baseball bat during lunch hour). Miscellaneous: Jackson v. Euclid-Pine Inv. Co. (1930) 223 Mo. App. 805, 22 S. W. (2d) 849 (employee started motor of car for personal convenience and was killed by carbon monoxide poisoning); Leilich v. Chevrolet Motor Co. (1931) 328 Mo. 112, 40 S. W. (2d) 601 (salesman, while changing tire before starting to work overcome by carbon monoxide poisoning); Watson v. Pitcairn (Mo. App. 1940) 139 S. W. (2d) 552 (employee of railroad injured attempting to board wrong train, thinking it was his bunk car).

Everard v. Woman's Home Companion Reading Club (1938) 234 Mo. App. 760, 122 S. W. (2d) 51, a street accident case, involved injuries to a magazine solicitor resulting from running a splinter into his foot as he was leaving a restaurant in a district to which he had been assigned. It was held that the injury was compensable, being in the course of the employment, and that it arose out of the employment because of the very nature of the particular employment; that the whole district was the employee's place of work.

instant case, the courts are not losing sight of the basic policy underlying the Workmen's Compensation Act, which would resolve doubts in favor of the employee.[15]

V. M.

15. In Bicanic v. Kroger Grocery & Baking Co. (Mo. App. 1935) 83 S. W. (2d) 917, 923, it was said: "In consonance with the generally accepted view that the Workmen's Compensation Law should be liberally construed, it has been definitely held that a doubt as to right of compensation should be resolved in favor of the employee." See also Betz v. Columbia Tel. Co. (1930) 224 Mo. App. 1004, 1011, 24 S. W. (2d) 224, 228; Pruitt v. Harker (1931) 328 Mo. 1200, 1210, 43 S. W. (2d) 769, 773; Schulz v. Great Atl. & Pac. Tea Co. (1932) 331 Mo. 616, 624, 56 S. W. (2d) 126, 128.